PP

v.

HO JIN LOCK & ANOTHER CASE

HIGH COURT MALAYA, PULAU PINANG
JEFFREY TAN J
[CRIMINAL TRIALS NOS: 44-6-93 & 44-7-93]
31 JULY 1999

CRIMINAL LAW: *Firearms (Increased Penalties) Act 1971 - Section 3 - Discharging firearm while committing a scheduled offence - Ingredients - Whether robbery a scheduled offence - Intention to cause death or grievous hurt - Accused discharging firearm in presence of eyewitnesses - Recovery of slugs and cartridge - Whether offence proved - Failure to produce firearm at trial - Whether fatal - Firearms (Increased Penalties) Act 1971, ss. 2, 3, 3A*

CRIMINAL LAW: *Firearms (Increased penalties) Act 1971 - Section 3A - Abetting commission of scheduled offence where firearm was discharged - Proof - Whether robbery a scheduled offence - Whether accused knew that firearm was discharged - Whether accused actively participated in robbery - Firearms (Increased Penalties) Act 1971, ss. 2, 3, 3A*

EVIDENCE: *Identification evidence - Identification of accused - Quality of identification - Eye-witnesses - Whether could be mistaken in identification of accused - Identification parade - Whether properly conducted - Whether accused fairly singled out to identification witnesses*

CRIMINAL PROCEDURE: *Defence - Alibi - Pre-trial notice - Section 402A Criminal Procedure Code - Failure to give mandated notice to prosecution - Whether fatal - Evidence in support of defence of alibi - Whether to be excluded*

CRIMINAL PROCEDURE: *Trial - Close of prosecution case - Defence - Accused electing to remain silent - Effect - Whether nothing to rebut prosecution case - Whether to be convicted*

On 5 August 1992, at about 2.30am, the accused ('Ho') and his friend ('Tan') went to Hot Lips Lounge ('the lounge') at No. 3-J, Jalan Penang, Georgetown, Penang. Both were wearing crash helmets with Tan also wearing a spectacle. At the material time, a group of six professionals ('Ananth's party'), including two magistrates ('Ananth and Donald'), a lawyer ('Edmund') and a teacher ('Ramesh'), were seated at the public bar of the lounge. Upon entering the lounge, Ho and Tan confronted its owner ('Lee') and after some argument Tan repeatedly hit Lee with a crash helmet. Ramesh stood up and started to walk towards the washroom, but just then, Ho, who had a surgical plaster on

his forehead, pulled out a gun and ordered Ramesh to sit down. Ramesh obliged, after which Ho and Tan confronted Ananth's party. Ho then pointed the gun at Edmund and shot him. Thereafter, Ho ordered all present to take out their property, which everyone obliged by putting their wallets on the table. Tan took all the wallets and had also forcibly relieved Donald and one Kumari of their gold necklaces. In the meanwhile, Ho reloaded his gun and as he was doing that a cartridge fell onto the floor. Ho then ordered everyone to keep their heads down, and when Ananth's party obliged, Ho shot Ramesh. Edmund survived the shooting but Ramesh died as a result of "haemorraghic shock due to gunshot wound".

Ho was charged under s. 3 of the Firearms (Increased Penalties) Act 1971 ('the Act') for discharging a firearm with intent to cause death while committing a scheduled offence, whilst Tan was charged under s. 3A of the Act for being Ho's accomplice. In the court, the prosecution did not produce the firearm allegedly used by Ho, but the prosecution witnesses, including the surviving members of Ananth's party, gave a consistent and vivid description of the events that transpired. *Inter alia,* the witnesses identified Ho as the gunman who shot Edmund and Ramesh, and Tan as the one who hit Lee and took the wallets and the necklaces from them. The facts further showed that at identification parades held by the police, all witnesses except Donald and Edmund identified Ho as the gunman, while two of them identified Tan as the bespectacled man.

Both Ho and Tan were called upon to enter their defence, whereupon Ho elected to remain silent. Tan raised a defence that smacked of an alibi, testifying that he played no part in the alleged crimes and was outside the lounge at the material time, that 'the spectacled man' was one David Goh Pok Wah ('David'), and that he was being mistakenly identified. It was not in dispute that David had assisted the police in the investigations of the robbery cum shooting but was not a suspect. It was also not in dispute that Tan, whilst raising his alibi defence, had not given any prior notice as required by s. 402A Criminal Procedure Code ('CPC'). The primary questions that arose were (i) whether Ho had discharged a firearm with intent to cause death or hurt to Edmund and Ramesh at the time of the robbery that he and Tan were committing; and (ii) whether Tan, knowing that Ho had discharged a firearm, had participated in the robbery.

Held:

[1] The recovery of slugs from Edmund's brain and from Ramesh's body established most undoubtedly that both Edmund and Ramesh were shot by a firearm at the material time. The testimony of the pathologist established just as undoubtedly that Ramesh was mortally struck down by a bullet from a firearm.

[2] The production of the actual gun is not essential for a successful prosecution of a s. 3 offence. In this case, given the undoubted truth of the slugs, cartridge and wounds sustained by Edmund and Ramesh, the failure to produce the firearm could not cast any reasonable doubt on the truth of a firearm and a discharge of that firearm at the lounge. There was, unquestionably, a serviceable firearm and discharge of that firearm at the material time.

[3] By s. 2 of the Act, a "scheduled offence" means any offence enumerated in the schedule to the Act. Robbery is an offence enumerated in the schedule and is therefore a scheduled offence.

[3a] Undoubtedly, there was a robbery here and there was a discharge, twice over, of a serviceable firearm at the time of the commission of that scheduled offence. That discharge of a firearm, first at Edmund and then at Ramesh after property was forcibly taken, was with intent to cause grievous injury and/or death to Edmund and Ramesh. A firearm is designed to kill and/or to maim or injure grievously, and it must be reasonably inferred that one who aims a firearm at another and pulls the trigger, both acts obeying the direction of the mind, must have had the intention to kill, maim or injure. On the facts, the requisite intent to cause death or hurt under s. 3 of the Act was therefore satisfied.

[3b] Since robbery was committed between the first shot at Edmund and second shot after an interval at Ramesh, the discharge of the firearm was 'during the occasion and/or at the commission of a scheduled offence'. That being so, the other ingredient of a s. 3 offence, namely the discharge of a firearm "at the time of committing or attempting to comit or abetting the commission of a scheduled offence" was also satisfied.

[4] Bearing in mind that the lights at the lounge were lit at the material time, that Ho, whose face was not covered, was only 10 feet away from the witnesses, and that all witnesses had Ho under observation for about 15 to 20 minutes, it could not be said that the witnesses who identified Ho as the gunman could have been mistaken in their identification of Ho. The evidence also showed that the witnesses could see the faces of the two men when they entered the lounge at about 2.00 a.m.

[4a] Although only Ananth, Ooi and Edmund had positively identified Tan as the bespectacled man, these witnesses could not be mistaken in their identification. They had Tan under observation for about 15 to 20 minutes and so observed him when the lounge was lit. Ooi also saw Tan earlier at 12.30am when Tan was mediating between two groups of quarreling patrons and when he was close to both Ho and Tan.

Ananth and Edmund's description of the bespectacled man indeed fitted Tan like a glove, but the evidence was never challenged by the defence. Ananth, Ooi and Edmund were credible and reliable witnesses and there is no reason to doubt or disbelieve their identification of Tan.

[5] The identification parades were properly conducted by the police. Athough the parade participants were not wearing helmets and spectacles, the process of identification was not conducted in circumstances unfair to Ho or Tan. There was no violation of the identification rules and both Ho and Tan were fairly singled out to the identification witnesses

[6] Given the undoubted truth of the discharge of a firearm, the robbery and the further discharge of that firearm, it must be said, after a maximum evaluation of the prosecution evidence, that the prosecution had proved the commission of a s. 3 offence against Ho beyond reasonable doubt.

[7] Tan must have known that a firearm had been discharged when Edmund was shot. Tan could not have not seen the wound sustained by Edmund, and the gun pointed at Ananth's party, but did nothing to prevent a further discharge of the firearm. Rather, he walked over to the table, gathered the wallets and snatched the gold necklaces in question. That was not all as Tan also tried to smash an empty glass on Edmund. The evidence thus showed that Tan had actively participated in a scheduled offence *ie*, robbery. The prosecution had proved beyond reasonable doubt the commission of a s. 3A offence against Tan.

[8] It was Ho's right to remain silent. But with silence, there is nothing to rebut the prosecution case and nothing to cast any reasonable doubt on the prosecution case. Ho, as a result, has not cast any doubt on the prosecution case and is guilty as charged.

[9] Under s. 402A CPC, notice must be given of the defence of alibi. The court has no discretion to waive the pre-trial notice where the evidence to be adduced is "evidence in support of the defence of alibi". In any case, failure to give such notice will result in the exclusion of "evidence in support of the defence of alibi".

[9a] Section 402A is silent on the meaning of the words "evidence in support thereof". Be that as it may, the meaning of the words cannot differ from that assigned by s. 11 (8) of the English Criminal Justice Act 1967 on the term "evidence in support of an alibi".

[10] It is difficult to envisage what evidence amounts to evidence in support of a defence of alibi as it depends on the particular facts of each case. The determining test, nonetheless, is 'whether the evidence shows or tends to show that by reason of the presence of the accused at some particular place or area at a particular time, he cannot be or is unlikely to be at the place where the offence is committed'.

[10a] Tan's affirmation that he was outside the lounge at the material time was not a denial but evidence tending to show that, by reason of his presence outside the lounge at the material time of the commission of the crime, he was not or was unlikely to have been inside the lounge where the crimes were committed at the time of commission. The evidence was affirmative proof that Tan was elsewhere and that his presence elsewhere is inconsistent with his presence at the time and place alleged, and with participation in the crime at the time and place alleged. That is evidence in support of an alibi. Hence, the evidence that he was elsewhere, without a notice of alibi, must be excluded.

[11] There is no evidence of David's presence and there is no evidence, even remotely, supporting David's presence at or about the vicinity of the scene of the crime at or about the time of the commission of the crime. It is just not reasonable to accept the possibility that David was the bespectacled man with the gunman at the material time of the commission of the crime, but mistaken by the witnesses for Tan.

[12] There is no doubt that (i) Ho had discharged a firearm, with intent to cause death or hurt to Edmund and Ramesh, at the time of the robbery that he and Tan were committing; (ii) Tan, who participated in the robbery and knew that Ho was having a firearm after the first shot, took no steps, let alone reasonable steps, to prevent the further discharge of that firearm; and (iii) Tan had participated in the robbery after the discharge of the first shot. Tan's defence has not raised a reasonable doubt as to his guilt and is guilty as charged.

[Both accused guilty as charged and sentenced to death.]

Case(s) referred to:

Arulpragasan Sandaraju v. PP [1996] 2 CLJ 611 ***(refd)***
Dato' Mokhtar Hashim & Anor v. PP [1983] MLJ 232 ***(refd)***
Hussin Sullit v. PP [1988] 2 MLJ 232 ***(refd)***
Khoo Hi Chiang v. PP [1994] 2 CLJ 151 ***(foll)***
Krishnan & Anor v. PP [1981] 2 MLJ 121 ***(refd)***
Ku Lip See & PP [1982] 1 MLJ 194 ***(refd)***
Ng Thian Soong v. PP [1990] 1 CLJ 1107 ***(refd)***
Ong Poh Cheng v. PP [1998] 4 CLJ 1 ***(refd)***
PP v. Chan Choon Keong [1989] 2 CLJ 216 ***(refd)***
PP v. Chiong Cheng Wah [1988] 1 CLJ 534 ***(foll)***
PP v. Goh Kim Looi [1994] 2 CLJ 809 ***(refd)***
PP v. Hussain Sidin [1991] 3 CLJ 2568 ***(refd)***
PP v. Lim Chen Len [1981] 2 MLJ 41 ***(refd)***
PP v. Lin Lian Chen [1992] 4 CLJ 2086 ***(refd)***
PP v. Mohammad Majid [1997] 1 MLJ 121 ***(refd)***
PP v. Ong Poh Cheng [1996] 1 CLJ 501 ***(refd)***
PP v. Saat Hassan [1988] 2 CLJ 80 ***(refd)***
R v. Foll [1957] 21 WWR 481 ***(refd)***
R v. Turnbull & Ors [1976] 3 All ER 549 ***(foll)***
Rangapula & Anor v. PP [1982] 1 MLJ 91 ***(refd)***
Sakhuja v. Allen [1972] 2 All ER 311 ***(refd)***
Sp Suppiah Chettiar v. KS Navaradnam [1972] 2 MLJ 60 ***(refd)***
Vasan Singh v. PP [1989] 2 CLJ 402 ***(refd)***
Wong Swee Chin v. PP [1981] 1 MLJ 212 ***(refd)***
Yau Heng Fang v. PP [1985] 2 CLJ 22 ***(refd)***

Legislation referred to:

Criminal Procedure Code, s. 402A
Firearms (Increased Penalties) Act 1971, ss. 2, 3, 3A
Penal Code, s. 390
Road Transport Act 1981, s. 25

Criminal Justice Act 1967 [UK], s. 11(8)
Criminal Procedure Code [Sing], s. 155(9)
Road Safety Act 1967 [UK], ss. 3(3)(a)

Other source(s) referred to:

Black's Law Dictionary, 6th edn
Criminal Law Review, 1978, pp 277, 278
Hamid's Criminal Procedure, pp 879, 880
Sarkar on Evidence, 14 edn, p 171

Reported by WA Sharif

JUDGMENT

Jeffrey Tan J:

Both accused, in this joint trial, are tried for offences under the Firearms (Increased Penalties) Act 1971 that carry the mandatory death penalty, in each case, upon conviction.

In 45-7-93, the accused Tan Kim Ho (OKT1) is tried for the following offence:

> Bahawa kamu pada 5 Ogos 1992, jam lebih kurang 2.20 pagi di Hot Lips Lounge, No. 3-J, Jalan Penang, di dalam Daerah Georgetown, di dalam Negeri Pulau Pinang telah melakukan rompakan di tempat berkenaan, dan semasa melakukan rompakan itu, kamu telah melepaskan tembakan yang menyebabkan kecederaan ke atas seorang nama Edmund a/l K Gnanamuthu dan juga menyebabkan kematian ke atas seorang nama M Ramesh a/l Munisamy, dengan demikian kamu telah melakukan satu kesalahan di bawah Seksyen 3, Akta Senjatapi (Penalti Lebih Berat) Tahun 1971 (Akta 37) yang boleh dihukum di bawah Seksyen yang sama Akta tersebut.

In 45-6-93, the accused Ho Jin Lock (OKT2) is tried for the following offence:

> Bahawa kamu pada 5 Ogos 1992, jam lebih kurang 2.20 pagi di Hot Lips Lounge, No. 3-J, Jalan Penang, di dalam Daerah Georgetown, di dalam Negeri Pulau Pinang telah didapati berada bersama dengan Tan Kim Hoo (K/p. No: 7052640) melakukan rompakan di tempat tersebut, dan semasa melakukan rompakan tersebut, kamu dengan semunasabahnya mempunyai pengetahuan bahawa Tan Kim Hoo mempunyai sepucuk senjatapi di dalam miliknya, dan bahawa Tan Kim Hoo telah melepaskan tembakan dengan menggunakan senjata tersebut dengan niat untuk menyebabkan kecederaan ke atas seorang nama Edmund a/l K Gnanamuthu dan kematian terhadap seorang nama M Ramesh a/l M Munisamy dan dengan itu kamu telah melakukan satu kesalahan yang boleh dihukum di bawah Seksyen 3A, Akta Senjatapi (Penalti Lebih Berat) 1971 (Akta 37).

The prosecution adduced the following evidence. On 4 August 1992, at about 11.30pm, six young professionals (Ananth's party) – two magistrates of the Georgetown Magistrate Court (Ananth Velusamy (PW3) and Donald Joseph Franklin (PW8)), two legal practitioners (Krishna Kumari (PW5) and Edmund a/l Ghanamuthu (PW6)), a teacher (Ramesh), and a bank officer (Terrence Stephen Periera (PW4)) – were at a public bar, "Hot Lips Lounge", at Jalan Penang, Georgetown. They were seated – if one were to enter the lounge from the main entrance at the side of the building – at the extreme right of the lounge. Past midnight, about 12.30am on 5 August 1992, there was a commotion at the opposite end of the lounge, near the stage. Ooi Kean Lee (Ooi – PW7), the proprietor of "Hot Lips" lounge, switched on the lights and proceeded to investigate the cause – there was an argument between two

groups of patrons. Those patrons departed from the lounge but returned a short while later, and fought, with beer mugs, inside the lounge. One group consisted of 2 patrons while the other group consisted of about 7 to 8 patrons. One patron sustained an injury above his eye-brow. After the fight, the two groups departed from the lounge. The lights were dimmed once more.

Meanwhile, Ananth's party, who was not paying attention to the commotion, stayed on at the lounge. However, by about 2.30am (5 August 1992), then past the closing hour, all other patrons had left the lounge. The lights were switched on. Only Ananth's party, Ooi, and Lee Kum Weng (Ooi's partner) standing behind the bar counter opposite Ananth's party, were in the lounge.

Just then, two men wearing crash helmets walked into the lounge, towards Lee Kum Weng. Those two men shouted angrily, in Hokkien, at Lee Kum Weng. One of them, wearing "John Lennon" style spectacles, hit Lee Kum Weng repeatedly with a crash helmet lying on the bar counter. The other man stood by. Ananth's party was about 10 feet away. Ramesh got up and started to walk towards the washroom. Just then, the other man (who had a surgical plaster above his left eyebrow) pulled out a gun and ordered Ramesh to sit down. Ramesh sat down, next to Terrence. That man, with gun pointed at Edmund, asked Edmund where he was from. Edmund replied he was from Penang. Then that man with his gun pointed at Ramesh asked Ramesh, "you bond?". Ramesh replied, "no". He further asked Ramesh, "lu dari mana?". Ramesh replied, "dari Seremban". Suddenly, that man shot Edmund. Blood poured from Edmund's face. Then that man with gun (gunman) ordered all those present to take out their property. The gunman with gun pointed at those present proceeded to reload his gun; as he was reloading, one cartridge fell onto the floor. Ananth took out his wallet, and so did the others, and placed it on the table in front of him. At that point, the bespectacled man walked over; after frisking Ananth, Terrence, Ramesh, and Donald, the bespectacled man collected the wallets on the table. The bespectacled man then snatched the gold necklaces from Donald and Kumari's necks, and ordered Ananth's party to stand up. Ananth submitted, and so did the others, to that order. Edmund, bleeding from the face, was lying on the couch. The bespectacled man ordered Edmund to stand up. When Edmund did not stand up, the bespectacled man took an empty glass and smashed it on Edmund; at that moment, Edmund slipped, and the empty glass hit a table instead. The gunman ordered everyone to keep their heads down. Submitting, Ananth had his knees and forehead, and so did Ooi and the others, on the floor. Another gunshot was heard. Then, there was the sound of the door opening and closing.

Ananth, the first to get off the floor, lifted his head. He found that both men had fled. The others too got up, except for Ramesh and Edmund. Ramesh, lying on the floor, was dead. Ooi ran towards the door. He stepped out of the lounge and saw a taxi – 2454 – driving away. Ooi locked the doors of the lounge and telephoned the police. An ambulance, and then the police arrived at the scene. The police recovered a live cartridge (.38 Special) near Ramesh's body.

Edmund, shot in the face and with a severe head injury, was operated, a few hours later, at the Gleaneagles Medical Centre, Georgetown; a slug was removed from Edmund's brain. A government pathologist (PW10) testified that he conducted the post mortem, on Ramesh, that he recovered a slug from Ramesh's body, and that the cause of death was "haemorraghic shock due to gunshot wound".

Reasonably, even witnesses at the scene of the one and same event cannot and are not expected to give replica evidence. Some witnesses are more perceptive and more observant than others, while some witnesses with a better view would observe what others could not. The powers of recollection of individuals and their impression of the same event are also not the same. As such, it cannot be said, just because some witnesses failed to witness, affirm or recollect an event, that what others witnessed must necessarily be untrue.

In the instant case, there was no replica evidence from the prosecution witnesses. And because there was no replica evidence, there were some slight but immaterial differences in their respective testimony. Nonetheless, the essential story of the witnesses at the lounge, without any material contradictions, is the same. First, Edmund was shot and then Ananth's party were robbed of their property. Then, another gunshot was heard and Ramesh who was alive and well was dead on the floor.

And there could be no doubt that both Ramesh and Edmund were shot, just as the prosecution witnesses said. The recovery of slugs from Edmund's brain and from Ramesh's body established, most undoubtedly, that both Edmund and Ramesh were shot by a firearm at the material time in question. And the testimony of the pathologist established just as undoubtedly that Ramesh was mortally struck down, by a bullet from a firearm.

Admittedly, it was not produced the firearm in question. Yet, that there was a serviceable firearm and discharge of that firearm could not be denied, for there is incontestable evidence – (i) slugs and gunshot wounds and (ii) the slugs in Edmund and Ramesh – of the discharge of a serviceable firearm. That is the only deduction that could be drawn from the incontestable evidence that could not be fabricated – the slugs, gunshot wounds and blood stains at the

lounge. That there was a discharge of a serviceable firearm at the material time is the only conclusion that could be reached. The recovery of a live cartridge at the scene merely augmented what is already in surfeit on the discharge of a firearm. For, with production of the slugs and live cartridge and with the testimony, *inter alia*, of the doctors that those slugs were recovered from Edmund's brain and from Ramesh's body – as said, evidence that could not have been fabricated – it would defy all logic and good sense to doubt the truth of the firearm and discharge of that firearm at about 2.30am on 5 August 1992, just because the actual firearm was not produced. Given the undoubted truth of the slugs, cartridge and wounds sustained by Edmund and Ramesh, the failure to produce the firearm in question could not cast any reasonable doubt on the truth of a firearm and discharge of that firearm at "Hot Lips" Lounge. There was, unquestionably, a serviceable firearm and discharge of that firearm at the material time. Otherwise, Edmund and or Ramesh could not have sustained their gunshot wounds.

Section 3 of the Firearms (Increased Penalties) Act 1971 (Act) reads:

> Any person who at the time of his committing or attempting to commit or abetting the commission of a scheduled offence discharges a firearm with intent to cause death or hurt to any person, shall, notwithstanding that no hurt is caused thereby, be punished with death.

And s. 3A of the Act, which carries the same penalty as s. 3, reads:

> Where, with intent to cause death or hurt to any person, a firearm is discharged by any person at the time of his committing or attempting to commit or abetting the commission of a scheduled offence, each of his accomplices in respect of the offence present at the scene of the commission or attempted commission or abetment thereof who may reasonably be presumed to have known that such person was carrying or had in his possession or under his custody or control the firearm shall, notwithstanding that no hurt is caused by the discharge thereof, be punished with death, unless he proves that he had taken all reasonable steps to prevent the discharge.

A "scheduled offence" means "any offence enumerated in the schedule" to the Act (s. 2 of the Act), and robbery which is an offence enumerated in the schedule is a scheduled offence.

Robbery, which is not defined in the Act but takes on, in the context of the Act, the definition in the Penal Code, is defined, in s. 390 of the Penal Code (F.M.S. Cap 45), as follows:

Section 390 Robbery

In all robbery there is either theft or extortion

Theft is robbery, if, in order to the committing of the theft, or in attempting the theft, or in carrying away of attempting to carry away property obtained by the theft, the offender, for that end, voluntarily causes or attempts to cause to any person death, or hurt, or wrongful restraint, or fear of instant death, or of instant hurt, or of instant wrongful restraint.

Extortion is robbery, if the offender, at the time of committing the extortion, is in the presence of the person put in fear and commits the extortion by putting that person in fear of instant death, of instant hurt, or of instant wrongful restraint to that person or to some other person, and, by so putting in fear, induces the person so put in fear then and there to deliver up the thing extorted.

To complete the definitions, the Penal Code defines theft and extortion as follows:

Section 378 Theft

Whoever, intending to take dishonestly any movable property out of the possession of any person without the person's consent, moves that property in order to taking such property, is said to commit theft.

Section 383 Extortion

Whoever intentionally puts any person in fear of any injury to that person or to any other, and thereby dishonestly induces the person so put in fear to deliver to any person any property or valuable security, or anything signed or sealed which may be converted into a valuable security, commits extortion.

Barring the ill-fated Ramesh and the now departed Lee Kum Weng (who succumbed to illness in 1995), all witnesses at the lounge (Ananth's party and Ooi) testified that their property (wallets and gold necklaces) was forcibly taken from them. And there could be no doubt that property was forcibly taken, just as Ananth's party and Ooi so testified. Already, the deadly threat of the firearm would have put considerable fear into Ananth's party and Ooi, and would have intimidated them into total submission. And Ananth's party and Ooi, with the discharge of the firearm at Edmund and with the horrendous wound that Edmund sustained, would have been petrified, for they would have realized, by then if not before, that both the firearm and the inherent threat to use that firearm, lest there be resistance, were real and not to be taken lightly. After all, Ananth's party and Ooi had a chilling foretaste of the violence that could be meted out to them, they having just witnessed Edmund being struck down by the gun pointed at them. Clearly, Ananth's party and Ooi would have had no choice but to capitulate or risk similarly struck down, as the gunman had

ruthlessly demonstrated that he was ready and willing to use the gun in his hand. Indeed, Ananth's party and Ooi, after Edmund was shot, were under a very real threat of instant death, to any one of them. And so it proved to be, tragically, after property was forcibly taken, Ramesh was "summarily executed".

Undoubtedly, there was a robbery and there was a discharge, twice over, of a serviceable firearm at the time of the commission of that scheduled offence. And that discharge of a firearm, first at Edmund and then at Ramesh after property was forcibly taken, would have been with intent to cause grievous injury and or death to Edmund and Ramesh. For a firearm is solely designed to kill and or maim or injure grievously, and it must be reasonably inferred that one who aims a firearm at another person and pulls the trigger, both acts obeying, unless accidental, the direction of the mind, must have had the intention to kill, maim or injure grievously.

Apart from the requisite intent to cause death or hurt, the essential ingredient of a s. 3 offence is that the discharge of a firearm must be "at the time of ... committing or attempting to commit or abetting the commission of a scheduled offence".

What is the meaning of the word "at" in the context of the words "at the time of ... committing or attempting to commit or abetting the commission of a scheduled offence"? *Black's Law Dictionary* (6th edn) defines "at" as a term of considerable elasticity of meaning, and used *inter alia* to fix a time, though not necessarily *eo instante* or the identical time named, or even a fixed definite moment. The word "at" having an elastic meaning was also recognized by the Malaysian Courts in *Sp Suppiah Chettiar v. KS Navaradnam* [1972] 2 MLJ 60.

Section 3(3)(a) of the English Road Safety Act 1967 (substituted by s. 25 of the Road Transport Act 1981) provided that a person who failed to provide a specimen for a laboratory test should be guilty of an offence, if it was shown that "at the relevant time" he was driving or attempting to drive a motor vehicle on a road or other public place. In *Sakhuja v. Allen* [1972] 2 All ER 311, the House of Lords per Viscount Dilhorne said, "to give s. 3 a reasonable interpretation in its context, the words 'at the time' must be given a broad interpretation as signifying the occasion rather than the moment of time when the request was made".

In the instant case, robbery was committed between the 1st shot at Edmund and 2nd shot after an interval at Ramesh. Therefore, there could be no denying that the discharge of the firearm was during the occasion and or at the commission of a scheduled offence.

With regard to the offence under s. 3 of the Act which reads, "any person who at the time of his committing or attempting to commit or abetting the commission of a scheduled offence discharges a firearm with intent to cause death or hurt to any person, shall, notwithstanding that no hurt is caused thereby, be punished with death", given the undoubted truth of the discharge of a firearm, the robbery and the further discharge of that firearm, it must be said, after a maximum evaluation of the prosecution evidence, that the prosecution has proved the commission of the s. 3 offence beyond all reasonable doubt.

With regard to the s. 3A offence, all (living) witnesses testified that the bespectacled man, after Edmund was shot, demanded their property, gathered the property on the table, and snatched the necklaces of Donald and Krishna. The shot at Edmund was discharged inside the lounge. Reasonably, that bespectacled man nearby could not have not heard that gunshot. Those inside the lounge, and all would have heard that gunshot, would have realized, almost immediately without guesswork – for Edmund was bleeding from a head wound and a gun was pointed at Ananth's party and Ooi – that that was the sound of the discharge of a gun. Yet that bespectacled man surely knowing that a firearm had been discharged, and he could not have not seen the wound sustained by Edmund (because he would smash an empty glass at the already severly striken Edmund) and the gun pointed at Ananth's party, did nothing to prevent a further discharge of that firearm. Rather, from a few feet away, that bespectacled man, walked over to the table where wallets were placed, frisked Ananth, Terrence, Ramesh and Donald, gathered the wallets on the table, snatched 2 gold necklaces from Donald and Krishna's necks, and ordered Ananth's party to stand up. That was not all. That bespectacled man ordered Edmund, then lying on the couch with a slug in his head and probably bleeding profusely from his injury, to stand up. And when Edmund did not or could not stand up, that bespectacled man attempted to smash an empty glass on Edmund. Then the gunman ordered everyone to keep their heads down. Another shot was discharged, and Ramesh's life, for no apparent reason, was wasted.

Section 3A of the said Act reads:

> Where, with intent to cause death or hurt to any person, a firearm is discharged by any person at the time of his committing or attempting to commit or abetting the commission of a scheduled offence, each of his accomplices in respect of the offence present at the scene of the commission or attempted commission or abetment thereof who may reasonably be presumed to have known that such person was carrying or had in his possession or under his custody or control the firearm shall, notwithstanding that no hurt is caused by the discharge thereof, be punished with death, unless he proves that he had taken all reasonable steps to prevent the discharge.

Two men entered the lounge. One discharged a firearm with intent to cause death or hurt to Edmund at the time of the commission of a scheduled offence. The other, the bespectacled man, who must have heard the gunshot and knew then that the other (not him) was having a firearm, did nothing to prevent the further discharge of that firearm. The evidence clearly shows, that the bespectacled man actively participated in a scheduled offence – robbery. Clearly, the prosecution has proved, beyond a reasonable doubt, the commission of the s. 3A offence.

The remaining question is the identity of the men who entered the lounge at 2.30am. Who was the gunman and who was the bespectacled man? All prosecution witnesses (except Edmund) testified that one of the two men who entered the lounge at 2.30am wore spectacles. The court observed, throughout this trial, that OKT2 was wearing spectacles and sporting a thick dark moustache.

It is timely to examine the identification evidence that the prosecution adduced on the identity of those two men.

Ananth (PW3), presently a magistrate at the Jalan Duta Subordinate Courts, had no doubt that OKT1 shot Edmund and that OKT2 was the bespectacled man. From the witness box, Ananth identified OKT1 as the gunman and OKT2 as the bespectacled man. Ananth testified that he identified OKT1, at an identification parade held on 21 December 1992, as the gunman, and that he identified OKT2, at an identification parade held on 18 August 1992, as the bespectacled man. Ananth testified that the faces of OKT1 and OKT2, throughout the entire incident at the lounge, were not covered, that he paid full attention to OKT1 and OKT2 and that he could see the faces of OKT1 and OKT2. OKT1 had a surgical plaster above his left eyebrow. OKT2 did not have a moustache. He was very close to OKT2, when OKT2 was frisking him.

Cross-examined by Mr Karpal Singh, learned counsel for OKT2, Ananth said that he believed that OKT2, on 5 August 1992, did not have a moustache. The person who hit Lee Kum Weng wore spectacles, and appeared, from his features, to be of mixed parentage. OKT2 was wearing spectacles, when he identified OKT2 on 18 August 1992. Ananth disagreed with Mr Karpal Singh who proposed that he (Ananth) was mistaken in his identification of the man who hit Lee Kum Weng. Ananth also disagreed with Mr Karpal who proposed that OKT2, between 2am to 2.30am on 5 August 1992, was not in that part of the lounge where the alleged offences were said to have taken place. Cross-examined by Mr Harpal Singh, learned counsel for OKT1 who cross-examined after Mr Karpal with Mr Karpal's consent, Ananth said that he did not see the fight in the lounge nor OKT1's forehead being hit by a beer mug at 12.30am.

Re-examined, Ananth maintained that OKT2, on 5 August 1992, did not have a moustache. Ananth said he was not sure whether OKT2 had a moustache on 18 August 1992. Ananth said that he could identify OKT2, although OKT2 wearing a crash helmet, as he (Ananth) saw OKT2's face. Ananth said he (Ananth) was very sober. He could see both accused very clearly. His ability to recognize the accused was not affected by his state of fright.

Ooi (PW7) testified that the two men who entered the lounge at 2.30am were the 2 patrons who were quarreling with seven other patrons at 12.30am. Ooi testified that he saw clearly the faces of the two men when they returned to the lounge, at 2.30am. One had a surgical plaster above his eyebrow. Ooi identified OKT1 and OKT2 as the two men who entered the lounge at 2.30am. The man who hit Lee Kum Weng wore spectacles. Ooi identified OKT2 as that man. Ooi identified OKT1 as the gunman. Both OKT1 and OKT2, when they were quarreling with the other patrons, were not wearing crash helmets. Both OKT1 and OKT2, when they entered the lounge at 2.30am were not wearing crash helmets with visors. Ooi maintained that the two men who entered the lounge at about 2am were the same 2 patrons quarreling with the other patrons at 12.30am. Maybe, OKT2 on 5 August 1992 was sporting a slight moustache. OKT2 on 5 August 1992 wore spectacles, but not of the type worn by OKT2 in court. At 12.30am, when he was mediating between the two groups of quarreling patrons, he (Ooi) was very close to OKT1 and OKT2; he got to see their faces very clearly. Ooi testified that he identified OKT2, at an identification parade held on 19 August 1992, and that he identified OKT1, at an identification parade held on 21 December 1992.

Cross-examined by Mr Karpal, Ooi admitted that he did not see the persons who entered the taxi and that he did not know if those two men had fled from the scene in that taxi. Ooi could not remember whether the parade participants (including OKT2) were wearing crash helmets. Ooi disagreed with Mr Karpal who proposed that Ooi was confused and that Ooi merely suspected that OKT2 came to the lounge on 5 August 1992; Ooi maintained that he was clear headed throughout the entire incident. Ooi also disagreed with Mr Karpal who put (katakan) to Ooi that OKT2 was not at the lounge between 2am to 2.30am on 5 August 1992 and that OKT2 had not committed the acts alleged against OKT2.

Cross-examined by Mr Harpal, Ooi testified that OKT1 demanded for money before Edmund was shot. Ooi said he could not remember whether the parade participants were wearing crash helmets.

Re-examined, Ooi maintained that he was not confused when he identified both accused and that OKT2 was in his lounge between 2am to 2.30am on 5 August 1992.

Terrence (PW4) testified that one of the two men who entered the lounge at about 2am wore "John Lennon" spectacles. The other had a surgical plaster above his left eyebrow; he pulled out a gun. Terrence identified OKT1 as the gunman. Terrence said that OKT1's face was not covered and that he saw clearly OKT1's face. On 5 August 1992, the lights were brightly lit and he clearly saw OKT1 with a gun. Terrence said that he attended two identification parades. On 18 August 1992, he did not identify anyone. On 21 December 1992, he identified OKT1.

Cross-examined by Mr Jagdeep Singh standing in for Mr Karpal, Terrence said that his attention was focused on OKT1, as OKT1 was holding the gun. Terrence admitted that he could not identify the other man. Cross-examined by Mr Harpal, Terrence said he could identify OKT1 as he was staring at OKT1 for about 15-20 minutes. Terrence related that the participants at the 2nd identification parade (21 December 1992) were of Chinese descent, of similar height and not wearing spectacles or crash helmets.

Krishna (PW5) testified that both men who entered the lounge at about 2am wore crash helmets. Both stood about 10 feet away from her. One had a surgical plaster above his left eyebrow. Krishna identified OKT1 as that man with surgical plaster above his left eyebrow. Krishna testified that OKT1 pulled out a gun and shot Edmund. Krishna said that she saw clearly the faces of both men, but she could not identify the other man. She was paying attention to OKT1 as OKT1 was having the gun. Krishna testified that she attended two identification parades. On 28 August 1992, she did not identify anyone. On 21 December 1992, she identified OKT1. Krishna said that she was very sure that OKT1 was the man with the gun. The faces of both men were not covered.

Cross-examined by Mr Harpal, Krishna said that she first saw OKT1 on 5 August 1992. Then, OKT1 was wearing a crash helmet. She saw OKT1 again on 21 December 1992. Then, OKT1 was not wearing a crash helmet. The participants at the identification parade were not wearing crash helmets. Krishna said that she could not forget OKT1's face. The participants at the identification parade held on 21 December 1992 were of Chinese descent and of similar height.

Re-examined, Krishna testified that she could identify OKT1, although she was shocked and traumatized. She only had soft drinks.

Edmund (PW6) testified that the gunman had a surgical plaster on his forehead. That man, of Chinese descent, was less than 10 feet away from him. Edmund testified that he saw clearly the face of that man. The faces of both men were not covered. Edmund testified that he did not attend the identification parades

(Edmund, according to his unchallenged testimony, was hospitalized for 4 - 5 months). Edmund identified OKT1 as the gunman and OKT2 as the other man, who, according to Edmund, was not wearing spectacles.

Cross-examined by Mr Karpal, Edmund said he could not remember whether the other person, "not the one with the gun", had a moustache. Edmund disagreed with Mr Karpal who put to Edmund that Edmund was mistaken in his identification of OKT2. Edmund also disagreed with Mr Karpal who put to Edmund that OKT2 "was not there as advocated by (Edmund)". Re-examined, Edmund said he was positive that OKT2 was one of the men who entered the lounge at 2am. Edmund also said that he was positive of the roles played by the two men on the night in question.

Donald (PW8), presently the Assistant Director of the Legal Aid Bureau, Pulau Pinang, testified that one of the two men who entered the lounge at 2am wore spectacles. He was fair skin and had a surgical plaster above his eyebrow. The other held the gun. Donald could not identify those two men. Donald said that he failed to identify anyone at the identification parades.

It pans out, therefore, that all witnesses (except Donald) identified OKT1 as the gunman who shot Edmund. All witnesses (except Donald) testified that OKT1 had a surgical plaster above his left eyebrow or on his forehead. All witnesses (except Donald) identified OKT1 as one of the two men who entered the lounge at about 2am. And all witnesses (except Donald and Edmund) testified that they identified OKT1, at identification parades held on 21 December 1992.

All witnesses testified that the bespectacled man assaulted Lee Kum Weng. Ananth, Ooi, Terrence and Donald testified that that man wore spectacles. Only Edmund said that that man did not wear spectacles. Ananth testified that that man appeared to be of mixed parentage. Edmund said that that man "had a unique skin colour ... it was difficult to say if he was Indian or Chinese ... That marked him out". Ananth, Ooi and Edmund identified OKT2 as the bespectacled man. Ananth and Ooi testified that they identified OKT2 at identification parades held on 18 August 1992.

Only Donald failed at the identification parades or in court to identify OKT1 and or OKT2 as the man/men who entered the lounge at about 2am.

Rather surprisingly, Mr Harpal did not challenge the identification evidence that OKT1 was the gunman in question when he was examining the prosecution witnesses who had identified OKT1 (Ananth, Ooi, Terrence, Kumari and Edmund), although he did put to Ananth (but with respect, it did not advance OKT1's cause) "that there was a fight and that a beer mug was smashed onto OKT1's forehead, at about 12.30am on 5 August 1992" and "that that fight resulted in OKT1 getting out of the pub to seek medical treatment".

But Mr Karpal proposed, when he was examining the prosecution witnesses who identified OKT2 (Ananth, Ooi and Edmund), that OKT2 was not the gunman's accomplice. Mr Karpal also proposed to Ananth that he (Ananth) was mistaken on his identification of OKT2 as the man who hit Lee Kum Weng. Mr Karpal proposed to Ooi that he (Ooi) was confused and that he (Ooi) merely suspected that OKT2 came to the lounge on 5 August 1992. More pointedly, Mr Karpal put to Edmund that he (Edmund) was mistaken on his identification of OKT2 and that OKT2 "was not there as advocated by (Edmund)". Mr Karpal also proposed to Ananth and Ooi that OKT2, between 2am to 2.30am on 5 August 1992, was not in that part of the lounge where the alleged offences were committed. Clearly, Mr Karpal was putting forward the defence case that OKT2 was mistakenly identified as the other man with the gunman at the material time in question.

In *R v. Turnbull and Others* [1976] 3 All ER 549, the Court of Appeal (a full court) laid down the following guidelines to be observed by a trial judge, whenever "identity" is an issue.

> First, wherever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleged to be mistaken, the judge should warn himself of the special need for caution before convicting in reliance on the correctness of the identification.
>
> Secondly, the judge should examine closely the circumstances in which identification came to be made. Such questions as: how long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever see the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by him and his actual appearance? ....
>
> Finally, [are there] any specific weaknesses which had appeared in the identification evidence[?]

Lord Widgery CJ, reading the judgment of the Court of Appeal, went on to say:

> All these matters go to the quality of the identification evidence. If the quality is good, and remains good at the close of the accused's case, the danger of a mistaken identification is lessened; but the poorer the quality, the greater the danger. In our judgment, when the quality is good, as for example, when the identification is made after a long period of observation, or in satisfactory conditions by a relative, a neighbour, a close friend, a workmate and the like, the jury can safely be left to assess the value of the identifying evidence even though there is no other evidence to support it; provided always, however that an adequate warning has been given about the special need for caution.

Those guidelines were indeed observed in *PP v. Chiong Cheng Wah* [1988] 1 CLJ 534; [1988] 3 MLJ 56, where Mohamed Dzaiddin J (as he then was) reminded himself of the *Turnbull Guidelines* but found nonetheless that the accused was positively identified by PW2 as the person who robbed and shot PW2; incidentally, Chiong was charged for an offence punishable under s. 3 of the Firearms (Increased Penalties) Act 1971.

In *Dato Mokhtar bin Hashim & Anor v. PP* [1983] MLJ 232 @ 261, Hashim Yeop A Sani J (as he then was) drew the following distinction between recognition and identification:

> As regards all these three witnesses it is important in my opinion to draw a distinction between recognition and identification. Recognition is more reliable than mere identification. Recognition of a person known to a witness would be more reliable than identification by a witness of a stranger.

Ananth, Ooi, Terrence, Krishna, and Edmund, were absolutely sure, when they gave their evidence from the witness stand, that OKT1 was the gunman. Each unhesitatingly identified OKT1 as the gunman. Ananth said that he was paying full attention to both men. The faces of both men, he said, were not covered. Ooi testified that he saw clearly the faces of both men when they returned to his lounge at about 2am. They were the same two patrons quarreling with the other patrons at 12.30am. When he was mediating between the two groups of quarreling patrons, Ooi said, he was very close to OKT1 and OKT2 and he got to see their faces clearly. Terrence testified that the lights were brightly lit and he saw clearly OKT1 with a gun. Terrence said he could identify OKT1 as he was staring at OKT1 for about 15-20 minutes. Terrence said that his attention was focused on OKT1 as OKT1 was holding the gun. Krishna and Edmund also said that they saw clearly the faces of those two men. Krishna said she was paying attention to OKT1 as OKT1 was having the gun. Edmund said that the faces of those two men were not covered.

However, could Ananth, Ooi, Terrence, and Krishna, or any of them, have been mistaken in their identification of OKT1? According to all witnesses, the lights were switched on at the material time, and OKT1, whose face was not covered, was about 10 feet away from the witnesses who identified OKT1. Then quite obviously, all witnesses could see the faces of those two men who entered the lounge at about 2pm. Each gave cogent and acceptable reasons for their ability to recognize the gunman. Ananth said he was paying attention to the faces of those men. Terrence said that he saw clearly OKT1 with a gun. Krishna even said that she could not forget OKT1's face. According to Ooi, he first saw OKT1 and OKT2 at 12.20am, when the lights were switched on and when he was mediating between the two groups of quarreling patrons; the faces of OKT1 and OKT2 were not covered and he was close to OKT1

and OKT2. Then obviously, Ooi could also see the faces of those two men and had sufficient time to have had an impression of their faces. Ooi recognized the men who entered the lounge at about 2pm as the two patrons quarreling with the other patrons at about 12.30am, whose faces he could recognize and probably place, perhaps almost immediately as he had seen those faces just a short while earlier. All witnesses who identified OKT1 had OKT1 under observation for about 15 to 20 minutes. They were only about 10 feet away from OKT1 and OKT2. The lights were lit. And all witnesses who identified OKT1 had a special reason, since they were victims of the robbery cum killing, for remembering OKT1. Then, there are no weaknesses in the identification of OKT1, and there are no circumstances that could arouse any suspicion that OKT1 was mistakenly identified. There is no reason to disbelieve Ananth, Ooi, Terrence, and Krishna or doubt their testimony that OKT1 was the gunman in question. Ananth, Ooi, Terrence, and Krishna totally convinced the court, beyond all reasonable doubt, that OKT1 was the gunman in question.

On the identification of OKT2, only Ananth, Ooi, and Edmund positively identified OKT2 as the bespectacled man. As said, Terrence, Krishna, and Donald failed to identify the bespectacled man, and Mr Karpal proposed that OKT2 was not the second man in question. Could Ananth and Ooi have been mistaken in their identification of OKT2. It is relevant, first, to recall the dictum of Lord Widgery:

> If the quality is good ... the danger of a mistaken identification is lessened; but the poorer the quality, the greater the danger ... when the quality is good, as for example, when the identification is made after a long period of observation ...

Evidently, both Ananth and Ooi had OKT2 under a long period of observation. Paying attention to the faces of both men, Ananth observed OKT2 for about 15 to 20 minutes. Ooi observed OKT1 and OKT2 at 12.30am, when he was mediating between the two groups of quarreling patrons and when he was close to OKT1 and OKT2. Ooi recognized the two men who entered the lounge at about 2am as the two patrons quarreling with the other patrons at 12.30am Ooi had seen those two men before – the quarrel at 12.30am was reason for remembering those two patrons. The faces of those two men at 12.30am and at about 2am were not covered. Both Ananth and Ooi observed the face of the bespectacled man when the lounge was lit. Furthermore, Ooi observed OKT1 and OKT2 on two separate occasions. Both Ananth and Ooi had a special reason, since they were the victims of the robbery cum killing, for remembering OKT1's accomplice. Both readily picked OKT2, at identification parades held on 18 August 1992, soon after the event.

Already, the quality of the identification evidence against OKT2 is good, very good. But there is more that points to OKT2 as the bespectacled man. Ananth testified that the bespectacled man did not have a moustache, wore spectacles, and appeared, from his features, to be of mixed parentage. Edmund testified that the bespectacled man "had a unique skin colour ... it was difficult to say if he was Indian or Chinese ... That marked him out".

Startlingly, Ananth and Edmund's description of the bespectacled man, perhaps fitting OKT2 like a glove, was not challenged. The court observed that OKT2 has deep set eyes, a high nose and sharp facial features – all unusual features for a person of Chinese descent, if OKT2, going by his Chinese name, is indeed of Chinese descent. The court also observed that the colour of OKT2's skin is not inconsistent with a person of Chinese and Indian parentage. Putting facial features and skin tone together, it is altogether reasonable to say that OKT2 is probably of mixed parentage – Ananth and Edmund's description of OKT1's accomplice. Admittedly, the witnesses did not affirmatively say that the bespectacled man had a moustache – a facial feature that OKT2 sported throughout the trial. But then, a moustache, easily grown and even more easily cast off, is a variable facial feature. And since a moustache is a variable facial feature, the fact that OKT2 has a moustache throughout the trial (whereas the bespectacled man had none) could not cast any reasonable doubt on the correctness of the identification that OKT2 was the bespectacled man. But where it was not variable – the deep set eyes, a high nose, sharp facial features, and skin colour – it supported the correctness of the identification and added to the quality of the identification evidence that OKT2 was indeed the bespectacled man.

Ananth and Ooi impressed the court that the most calm and collected amongst the victims of the robbery cum killing, for they were the first to react after the two men fled from the lounge. Both Ananth and Ooi were absolutely steadfast and resolute, not shaken at all, that OKT2 was the bespectacled man. Similarly, as in the case of their testimony and identification of OKT1, there is no reason to doubt or disbelieve their identification of OKT2. Ananth and Ooi, plainly, are credible and reliable witnesses.

At the close of the prosecution case, both learned counsel pointed to "weaknesses in the identification evidence". Citing *PP v. Chan Choon Keong* [1989] 2 CLJ 216; [1989] 2 MLJ 427, Mr Karpal submitted that the identification of OKT2 was unsatisfactory and that the court should act cautiously. According to Mr Karpal, Ananth testified that he told the officer in charge of the identification parades (SP16) that the assailants were helmeted. But PW16 denied he was so informed or that Ananth had informed him that the second person was wearing spectacles. The participants at the identification parades should be but were not wearing spectacles. Ananth first said that the

second person had a moustache and then said he had none. The parade participants should have been dressed in the manner of the assailants; Mr Karpal questioned why that was not done. Ananth testified that OKT2 was not wearing spectacles at the identification parade. But PW7 testified that OKT2 was wearing glasses at the identification parade. Mr Karpal also submitted that the identification witnesses, rather undesirably, were kept together. There was a difference between the evidence of PW11 and PW7. There must be corroboration of the identification in the manner of *PP v. Mohammad bin Majid* [1997] 1 MLJ 121. Mr Karpal also contended that Edmund's identification being dock identification has little value. Edmund's evidence, Mr Karpal counseled, in view of his injuries, "should be given a special treatment".

With respect, Mr Karpal had Ananth's testimony all wrong: (1) Ananth did not first say that the bespectacled man had a moustache and then said that he had none. Ananth said, (a) that OKT2 on 5 August 1992 did not have a moustache (see p. 23 of the notes of proceedings) – "Pada masa itu, OKT2 tidak bermisai", (b) that he believed that OKT2 on 18 August 1992 did not have a moustache (see p. 24 of the notes of proceedings) – "Saya percaya pada 18 May 1992 PKT tidak bermisai", and, (c) that OKT2 on 5 August 1992 did not have a moustache ... he was not sure whether OKT2 on 18 August 1992 had a moustache (see p. 29 of the notes of proceedings) – "Pada pagi 5 August 1992 OKT2 tidak bermisai. Saya tidak pasti samada OKT2 bermisai pada 18 August 1992". (2) Ananth did not testify that OKT2 at the identification parade was not wearing spectacles. Quite the contrary, Ananth testified that OKT2 was wearing spectacles (see p. 26 of the notes of proceedings) – "Semasa saya dapat cam OKT2 di kawad cam, beliau memakai cermin. Yang lain, saya tidak pasti".

Mr Karpal got it right though that the identification witnesses were "kept together" (in Inspector Dom bin Abdullah's office), that PW16 denied that Ananth had told him that the assailants wore helmets, and that the parade participants, in that they were not wearing crash helmets "were not dressed in the manner of the assailants". However, those were not weaknesses in the identification of OKT2 at the identification parades. The identification witnesses were only kept together (in Inspector Dom's office) before they were separately called to view the persons paraded. Each identification witness, after he/she had viewed the persons paraded, was kept apart from the identification witnesses in Inspector's Dom's office. There was never any communication between the identification witnesses who had viewed the persons paraded and the identification witnesses awaiting in Inspector Dom's office to view the persons paraded.

Mr Karpal contended that the participants at the identification parades should be wearing helmets and spectacles. Perhaps, it ought to be appreciated that "identification parades are held by the Police for the purpose of enabling witnesses to identify the persons who are concerned in the offence ... statements by persons identifying certain individuals being not made on oath and being made in extra-judicial proceedings are no evidence until they are called as witnesses. Even then they are not substantive evidence but can only be used only for corroboration or contradiction" (*Sarkar on Evidence* 14 edn p. 171) of the substantive evidence given in court regarding the identification of an accused as the doer of the criminal act. "The substantive evidence of a witness is his evidence in court; the purpose of identification (at test parades) is to test that evidence and the safe rule is that the sworn testimony of witnesses in court as to the identity of the accused who are strangers to the witnesses, generally speaking, requires corroboration which should be in the form of an earlier identification proceeding .... The exception to this rule of corroboration by an earlier identification is where the court can safely rely on it without previous identification. Identification parade belongs to investigation stage .... Whether a witness has or has not identified the accused during investigation is not of itself relevant at the trial. The actual evidence regarding identification is that given by the witness in court ... Test identification parade, if held promptly and after taking the necessary precautions to ensure its credibility, would lend the required assurance which the court ordinarily seeks to act on it. In the absence of such test identification parade, it would be extremely risky to place implicit reliance on identification made for the first time in court after a long lapse of time and that of persons who had changed their appearance" (*Sarkar ibid* p. 172).

In the instant case, the manner in which the identification parades were held, despite the fact that the parade participants were not wearing helmets and spectacles, threw no suspicion that the identification parades were unfairly conducted and or that the accused were unfairly pointed or singled out to the identification witnesses. The process of identification was not conducted in circumstances not fair to OKT1 or OKT2 and or not conducive to the elicitation of truth. There was no violation of the identification rules (for those rules, see *Sarkar ibid* 181). Rather, as evident from PW13 and PW16's evidence, the identification parades were conducted fairly and could be seen to have been conducted fairly. There was no mistake in the identification of OKT2. OKT2 was identified by two reliable and credible witnesses (Ananth and Ooi) who had observed OKT2 at close range for a long time. Both Ananth and Ooi were tested in their ability to pick out from a group the person (OKT2) they had said they had seen at the lounge, just 13 days after the event. And both Ananth and Ooi were totally unshaken by cross-examination. Clearly, this court can safely rely on Ananth and Ooi's testimony and

identification that OKT2 was the bespectacled man. There was no mistaken identification. The court is totally satisfied that OKT2 was the bespectacled man in question.

In his submission at the close of prosecution case, Mr Harpal contended in his opening statement that PW13 said that the parade participants wore helmets while all other witnesses said to the contrary. Mr Harpal submitted furthermore as follows. At the identification parades, OKT1 was only identified as the person who shot Edmund and not as the robber. That was fatal to the s. 3 offence. Krishna identified OKT as the gunman but not as a robber. Terrence failed to say that he identified OKT1 at the identification parade as a robber. The person who discharged the second shot was not identified. There was no evidence that OKT1 shot Ramesh. The second shot could not be pinned onto OKT1. The gun, bullets and necklaces were not produced, and the live cartridge was not dusted for finger prints.

With respect, the clear and unambiguous effect of the total evidence is, that OKT1 was identified (i) as one of the two patrons quarreling with the other patrons at 12.30am (ii) as one of the two men who entered the lounge at about 2am on 5 August 1992, (iii) as the gunman who demanded money before Edmund was shot, (iv) as the gunman who shot Edmund, and, (v) as the gunman who stood by, with his gun pointed at Ananth's party and Ooi, as property was forcibly taken from Ananth's party and Ooi. All witnesses (except Donald) testified that OKT1 had a surgical plaster above his left eyebrow or on his forehead. Apparently, even Mr Harpal accepted – for he put to Ananth, "that there was a fight and that a beer mug was smashed onto OKT1's forehead, at about 12.30am on 5 August 1992", and, "that that fight resulted in OKT1 getting out of the pub to seek medical treatment" – that OKT1 had a surgical plaster on his forehead. And all witnesses (except Donald and Edmund) were tested, at identification parades held on 21 December 1992, in their ability to pick out from a group the gunman they had said they had seen at the lounge on 5 August 1992. Again with respect, the inescapable deduction must be, since OKT1 was the one who shot Edmund and since OKT1 held the gun just seconds before Ramesh was shot, that OKT1 shot Ramesh. Without any doubt, OKT1 was the gunman in question.

At the close of the close of the prosecution case, the court was totally convinced, after a maximum evaluation of the prosecution evidence on the guidelines laid down in *Khoo Hi Chiang v. PP* [1994] 2 CLJ 151; [1994] 1 MLJ 265 and affirmed in *Arulpragasan a/l Sandaraju v. PP* [1996] 2 CLJ 611; [1997] 1 AMR 329, that the prosecution (even without Edmund's dock identification of OKT1 and OKT2 which was not given weight) had made out a beyond reasonable doubt case against OKT1 and a beyond reasonable case against OKT2, which if unrebutted would warrant his/their conviction. Accordingly, both OKT1 OKT2 were called to enter on their defence.

Trial only resumed after a long lull, as OKT1 was without counsel after his defence was called. When trial eventually resumed, OKT1 elected to remain silent, yes, OKT1 elected to remain silent, notwithstanding that the fact that prosecution had made out a case on beyond reasonable doubt evidence which if unrebutted would warrant his conviction. In *PP v. Goh Kim Looi* [1994] 2 CLJ 809; [1994] 2 AMR 1381, Vincent Ng JC (as he then was) remarked: "this new position (the maximum evaluation of the prosecution case) would justify automatic conviction of the accused should he remain silent". And in *Arulpragasan a/l Sandaraju v. PP* [1997] 1 AMR 329 @ 408, the Federal Court per Edgar Joseph Jr SCJ said, "if, upon the defence being called (after a maximum evaluation of the prosecution case) the accused elects to remain silent and calls no evidence then, the court must convict" Mr Gurmit, who conducted OKT1's defence after OKT1 was ordered to enter his defence, submitted – and that was all he submitted – that OKT1's silence was his undoubted right, that his silence was not an admission of guilt and that the actual gun must be produced. Shoring that ethereal submission for his learned friend, Mr Karpal gratuitously commented that "must convict" does not mean that a court must convict even if the court upon reflection is of the belief that the defence was wrongly called.

OKT1's silence was undoubtedly his right. Except unfortunately, with silence, there was and there is nothing to rebut the prosecution case and nothing to cast any reasonable doubt on the prosecution case. And also unfortunately, the production of the actual gun is not essential for a successful prosecution of a s. 3 offence (see *PP v. Ong Poh Cheng* [1996] 1 CLJ 501, affirmed by the Court of Appeal (*Ong Poh Cheng v. PP* [1998] 4 CLJ 1; [1998] 4 MLJ 8) and Federal Court). Ineluctably, as a result, OKT1 has not cast any reasonable doubt on the prosecution case. The prosecution case on beyond reasonable doubt evidence after a maximum evaluation with OKT1's is totally intact. The court is totally convinced that OKT1 is guilty as charged.

OKT2, who called no other witnesses, testified as follows. On 4 August 1992, at about 9.30pm, he was traveling in a taxi to Jalan Perak, Georgetown, to meet "David Goh" (David), his friend of about eight months, and OKT1. He stopped at Jalan Burma. "Sekarang saya kata saya naiki teksi dari Jalan Perak untuk pergi ke Jalan Burma. Saya pergi ke rumah David untuk jumpa dia. Saya telah lupa alamat David. Mungkin jalan itu Jalan Loh Boon Siew, iaitu, jalan yang boleh masuk Chinese Recreational Club". At David's house, he saw David and OKT1. They (OKT1, OKT2, David) engaged in small talk. OKT1 invited him and David to have food and drinks at "Kek Siang", a coffee-shop at Jalan Burma. The three of them went to "Kek Siang". He was there for about one and a half hours. He had a glass of beer. David and OKT1 also had beer. Together, they consumed three large bottles of beer. After eating

and drinking for 1 and half hours, David and OKT1 wanted to go to a lounge - to listen to music. David and OKT1 wanted to go to "Hot Lips", a lounge near Kah Motors, in front of Hotel Malaysia, Jalan Penang. OKT2 agreed, when shown P3(1), that P3(1) was a photograph of "Hot Lips Lounge". About 11.30pm to 12midnight, they reached "Hot Lips" lounge.

At "Hot Lips" lounge, they ordered alcoholic drinks. He drank a little. David and OKT1 drank (a little). He was at "Hot Lips" lounge for about one hour and 15 minutes. As he was drinking, OKT1 informed him that another group next to them was constantly looking in their direction. OKT1 told him that he (OKT1) wanted to go over to that group to talk to them. OKT1 walked to that group. About five minutes later, that group, of eight - nine persons, attacked OKT1. He and David stopped that group from further attacking OKT1. OKT1's head was bleeding, as OKT1 "dipukul olih seorang dari kumpulan". OKT1 had an injury above his left eyebrow. He and David helped OKT1 out of the lounge. The other group also departed from the lounge. David asked him (OKT2), because David said he had to attend to other business, to take OKT1 to a doctor. Then David left them. He (OKT2) took OKT1 to a 24 hours clinic. There, OKT1 was treated – his injury was stitched. He (OKT2) affixed a surgical plaster over OKT1's wound. They then proceeded, by taxi, to David's house. He left OKT1 at David's house. He (OKT2) told David and OKT1 that he (OKT2) had other business and he (OKT2) wanted to go home. "David dan OKT1 suruh saya jangan balik." "Saya pun tidak balik." Five minutes later he saw 2 "Honda" motorcycles in front of David's house. OKT1 and David asked him (OKT2) to follow them. David told him (OKT2) that they wanted to look for "Ah Goo". He (OKT2) did not know "Ah Goo". They did not tell him how or where they could find "Ah Goo". It was then 2am. He (OKT2) rode pillion on David's motor-cycle. OKT1 rode his own motor-cycle. They (David and OKT1) took him (OKT2) to "Hot Lips" lounge. There, OKT1 told him (OKT2) that he (OKT1) would enter the lounge to look for "Ah Goo". OKT1 told him (OKT2) to follow him (OKT1). David was outside the lounge. He (OKT2) followed OKT1 into the lounge to look for "Ah Goo". They did not find "Ah Goo" inside the lounge. It was then about 2.10am. There was a group of persons inside the lounge. They were Malays or Indians. He (OKT2) said to OKT1 that the person he was looking for was not inside the lounge. He (OKT2) saw OKT1 talking to the group of persons inside the lounge. He (OKT2) was at the bar counter. He (OKT2) said to OKT1 that he (OKT2) would depart first from the lounge. He (OKT2) walked out from the lounge. David, when he (OKT2) was walking out from the lounge, was outside the lounge. He told David that "Ah Goo" was not inside the lounge. David told him (OKT2) to wait outside the lounge. David entered the lounge. He (OKT2) was outside the lounge for about ten minutes. Then he (OKT2) saw OKT1 and David leaving the lounge. They (OKT1 and David)

appeared to be in a "kelam kabut" state. David and OKT1 started their motor-cycles. He (OKT2) asked them why they were in a "kelam kabut" state. They did not reply. They rode to David's house. At David's house, he (OKT2) informed OKT1 and David that he (OKT2) would be going home to sleep if there was nothing else. After that, he went home. Throughout 4 August 1992 to 5 August 1992, he did not see David or OKT1 carrying any firearm.

Refuting the allegations against him, OKT2 declared that he played no part in the alleged robbery inside the lounge. At the material time of commission of the alleged offences, he (OKT2) was not inside the lounge. OKT2 described David as 5' 6" or 7" tall, thinly built, wearing spectacles, and with a moustache – something like his.

Cross-examined, OKT2 testified as follows. He went out with OKT1 and David to drink because they were his friends. His intention was to have a drink.

OKT2 agreed with Mr Ahmad Fairus, the learned Deputy Public Prosecutor, (i) that he and OKT1 did not provoke the quarrel between OKT1 and the other group, (ii) that OKT1's injury was serious, (iii) that he stopped OKT1 from quarreling further because he did not want anything more serious to happen, (iv) that he (OKT2) was almost beaten by the other group, and, (v) that the lounge lights were switched on brightly when the quarrel was taking place.

However, OKT2 disagreed, (i) that a third party or the lounge owner intervened and advised the quarreling groups not to quarrel or fight, and, (ii) that he was dissatisfied at that time. OKT2 said that they returned to David's house (meaning, after the quarrel) as OKT1 was staying in David's house; OKT1 entered David's house.

OKT2 agreed that OKT1 said, as soon as OKT1 came out from David's house, that he was looking for someone. He and OKT1 arrived first at the lounge. David arrived later. By entering the lounge, OKT2 agreed that he was exposing (terdedah) himself to danger. But OKT2 denied, (i) "bahawa (dia) adalah seorang yang berani", and, (ii) that he (OKT2) was daring enough to enter the lounge because he knew OKT1 was carrying a firearm.

OKT2 agreed that he asked an elderly person at the bar counter about the person "yang saya mahu cari". OKT2 disagreed that he (OKT2) hit that elderly person when that elderly person said that he (elderly person) did not know the person that OKT2 was looking for. OKT2 said he only asked the elderly person at the bar counter about the person "yang saya mahu cari sahaja" and heard the answer that that person was not in the lounge. OKT2 disagreed that the lights of the lounge were brightly lit when he (OKT2) entered the lounge. OKT2 agreed that OKT1 was in front of the group in the lounge when he was at the bar counter.

OKT2 disagreed (i) that one of the persons in the lounge attempted to stand up after he (OKT2) hit the elderly person, (ii) that he (OKT2) hit the elderly person with the helmet that was lying on the bar counter, (iii) that he (OKT2) saw OKT1 pulling out and pointing a firearm at the persons in the lounge, (iv) that he (OKT2) was present when OKT1 pulled out and pointed a firearm and asked a few questions to the persons in the lounge, (v) that at that moment, a shot was discharged, (vi) that he (OKT2) did not attempt to stop OKT1 from pointing a firearm at the group in the lounge, (vii) that OKT1 ordered that group to stand up and remove all their property, (viii) that he (OKT2) searched that group, (ix) that he searched that group and that was why they could identify him (OKT2), (x) that he took their property, (xi) that he (OKT2) was with OKT1 during the robbery or that he played a role in the robbery, (xii) that he was the person who assisted OKT1 in the robbery, (xiii) that he was in the lounge for 15 to 20 minutes, (xiv) that he wore spectacles on the night in question, (xv) that the witnesses had not mistakenly identified him (OKT2), (xvi) that his (OKT2) version of the events is not true, (xvii) that it was only him and OKT1 who entered the lounge, (xvii) that David was not at all in the lounge on 4 August 1992 and 5 August 1992, (xix) that he did not take any steps to prevent OKT1 discharging the firearm, (xx) that he was with OKT1 when OKT1 discharged those two gunshots, (xxi) that he (OKT2) knew that OKT1 was carrying a firearm at the material time, (xxii) that Ananth, Ooi and Edmund could identify him (OKT2) because he (OKT2) was inside the lounge for 15 to 20 minutes, (xxiii) that he took an empty jug and attempted to smash it on Edmund, and, (xxiv) that he was, from his facial features, easily identifiable.

Lastly, cross-examined, OKT2 agreed (i) that he wore a helmet on the night in question, (ii) that his face was not covered, (iii) that he was sporting a moustache, and (iv) that his (OKT2) facial appearance "adalah luar biasa orang Cina". OKT2 also said that he did not hear gunshots.

Re-examined, OKT2 swore there was a David Goh. Prior to 5 August 1992, he had known David for eight years. David is Chinese. David's body and facial appearance were similar to his (OKT2).

After OKT2's testimony was recorded, Mr Karpal applied and was granted leave to recall the investigation officer (PW19), essentially, so Mr Karpal had informed, to cross-examine PW19 on the existence and whereabouts of David.

Recalled, ASP Nazlan bin Idris (PW19) testified that he was aware of a David Goh Pok Wah. David was not arrested and David was not wanted by the police. David's picture was circulated in the newspapers to assist police investigations. David was required to assist police investigations. David was not a suspect. On 5 September 1992, David came to his office to assist him

in his investigations of the robbery and shooting at "Hot Lips" lounge. David was not subpoenaed to be present in this proceedings. He (PW19) was not aware of the present whereabouts of David. David was not involved in the instant robbery and shooting.

At that juncture of PW19's testimony on recall, Mr Jagdeep objected that PW19 could not say that David was not involved, as PW19 was not at the scene. The learned DPP replied that PW19 was relating the outcome of his investigations. In the event, the court ruled that whether David was or was not involved in the robbery cum shooting is for the court to find. Yet what PW19 related, albeit PW19 was not at the scene, was not hearsay. PW19 was giving direct evidence of his investigative findings, and not direct evidence, testimonially, that David was not involved in the robbery cum shooting. There was that clear distinction. There was never any danger, if that was Mr Jagdeep's fear, that PW19's investigative finding that David was not involved in the robbery cum shooting would supplant (just because the investigation officer had said so) the finding of the court. Accordingly, Mr Jagdeep's objection was over-ruled.

Continuing his testimony on recall, PW19 added that David was a male Chinese, about 28 years old, of moderate built, not bearded nor mustachioed, and not bespectacled.

Briefly stated, OKT2's defence was that he (OKT2) was not the "bespectacled man" with the gunman at the material time, that he was not at the scene at the material time of the alleged robbery cum shooting, rather he was outside the lounge, and that he was mistakenly identified. According to OKT2, he entered the lounge, spoke to the elderly person at the bar counter, and left the lounge before any alleged robbery or shooting. After he came out from the lounge, David entered the lounge. Evidently, David was put forward, by OKT2, as the "bespectacled man" (not OKT2) who participated in the alleged robbery cum shooting.

OKT2 said he was not inside the lounge at the material time of the crime. That aspect of the defence smacks of an "alibi".

There is no statutory definition of "alibi". But what is an "alibi" is no mystery. "Alibi" is a Latin adverb meaning "elsewhere at another place" and if evidence for an accused that he was not present at a place at the time an offence was there committed is accepted by the jury, he is said to have established an "alibi" (*R v. Foll* [1957] 21 WWR 481 @ 491, Man CA, per Montague JA). "What is ordinarily meant by an alibi is that the accused's presence elsewhere is essentially inconsistent with his presence at the time and place alleged, and therefore with participation in the crime. An alibi may absolutely preclude the

possibility of presence at the alleged time and place of the act; or the alibi may not involve absolute impossibility, but only high improbability and yet be convincing (see *Criminal Law Review* 1978, pp. 277-8 and also on p 278 where it is further stated that a true alibi defence consists of a affirmative proof of the defendant's presence somewhere other than at the time and place alleged)": *Ku Lip See v. PP* [1982] 1 MLJ 194, 196 per Abdul Hamid FJ (as he then was). In short, "alibi is a defence that places the defendant at the relevant time of the crime in a different place than the scene involved and so removed therefrom as to render it impossible for him to be the guilty party" (*Black's Law Dictionary* 6 edn).

Notice must be given of the defence of alibi. Section 402A of the Criminal Procedure Code states:

> (1) Where in any criminal trial the accused seeks to put forward a defence of alibi, evidence in support thereof shall not be admitted unless the accused shall have given notice in writing thereof to the PP at least ten days before the commencement of the trial.
>
> (2) The notice required by subsection (1) shall include particulars of the place where the accused claims to have been at the time of the commission of the offence with which he is charged, together with the names and address of any witnesses whom he intends to call for the purpose of establishing his alibi.

"Basically", the objective of s. 402A is "to advert the mischief of the defence disclosing his defence of alibi towards the close of the trial" (*Hamid's Criminal Procedure* p. 879). "Section 402A of the Code is enacted to prevent any person from fabricating an evidence of alibi to enable the police to interrogate the intended witness or witnesses well before the date of trial to ascertain the validity of such a defence. It is indeed a condition precedent to the admissibility of the evidence of a witness purporting to support the alibi of an accused person": *Rangapula & Anor v. PP* [1982] 1 MLJ 91, per Yusoff Abdul Rashid J (as he then was).

"A similar view was also expressed by the Federal Court in *Krishnan & Anor v. PP* [1981] 2 MLJ 121. Again in *Vasan Singh v. PP* [1989] 2 CLJ 402; [1988] 3 MLJ 412 the Supreme Court comprising Abdul Hamid Ag. LP Hashim Yeop A Sani and Harun SCJJ, after referring to a number of decisions, explained (that) the scope of s. 402A (is) intended to prevent the accused from keeping back the defence of alibi and the witness until the last moment. The provision is intended to prevent the accused from keeping back (is) not merely procedural and as no pre-trial written notice had been given, in support of the alibi but also the fact that an alibi is to be raised." (*Hamid's Criminal Procedure* p. 880). "The court has no discretion to waive pre-trial

notice where the evidence to be adduced is evidence in support of the defence of alibi" (*Hussin bin Sullit v. PP* [1988] 2 MLJ 232, 243, per Mohamed Azmi SCJ; see also *PP v. Lim Chen Len* [1981] 2 MLJ 41 and *Ku Lip See v. PP (supra)*). If the notice of alibi mandated has not been given, then evidence in support of the defence of alibi will be excluded.

Section 402A is silent on the meaning of the words "evidence in support thereof". Still, the meaning of those words "cannot differ from that assigned by s. 11(8) of the English Act on the term 'evidence in support of an alibi'" (*Hussin bin Sullit v. PP* @ 236 per Mohamed Azmi SCJ; see also *Ku Lip See*). Accordingly, "evidence in support of an alibi" means evidence tending to show that by reason of the presence of the defendant at a particular place or in a particular area at a particular time he was not, or was unlikely to have been, at the place where the offence is alleged to have been committed at the time of its alleged commission (Criminal Justice Act 1967, s. 11(8)). Similarly, the Singapore Criminal Procedure Code (Cap 68, 1985 edn), s. 155(9) states:

> evidence in support of an 'alibi' means evidence tending to show that by reason of the presence of the accused at a particular place or in a particular area at a particular time he was not, or was unlikely to have been, at the place where the offence is alleged to have been committed at the time of its alleged commission.

Are there exceptions to the applicability of s. 402A? In *Hussin bin Sullit v. PP (supra)*, the Federal Court held that the following circumstances do not give rise to general exceptions to the mandatory rule on alibi notice:

> (a) where such evidence is in support of an alibi in respect of a day or time different from those specified in a charge; or,
>
> (b) where a charge is amended in the course of the trial relating to either the date, time or place set out in the original charge.

Whether any evidence adduced in the aforesaid circumstances comes within the meaning of evidence in support of a defence of alibi, so as to exclude them from the provisions of the s. 402A, "depends on its factual situation for the purpose of determining whether a particular evidence is or is not in support of a defence of alibi". "The answer to such a question should take into consideration, *inter alia*, the nature of the offence, the particulars given in the charge, the materiality of the amendment, and the type of alibi evidence intended to be adduced" (*Hussin bin Sullit v. PP (supra)* @ 234). "A determination whether particular evidence is evidence in support of an alibi entails a consideration whether the evidence shows or tends to show that by reason of the presence of the accused at some particular place or area at a particular time he cannot be or is unlikely to be at the place where the offence

is committed. It is difficult if not impossible to envisage with reference to a particular charge what evidence amounts or does not amount to evidence in support of a defence of alibi. It depends very much on the particular facts of each case" (*Ku Lip See (supra)* at 236, per Abdul Hamid FJ).

Apparently, a case of mistaken identity or a denial by an accused that he was at the scene of the crime even if he was in the vicinity, is not evidence in support of a defence of an alibi. In *PP v. Saat bin Hassan* [1988] 2 CLJ 80, in a unique situation that should not arise again in view of the abolition of jury trials, the 1st accused had indicated in his cross-examination at the preliminary inquiry that he was not at the scene. In his 3rd Ruling, Shankar J (as he then was) held: (i) that the 1st accused should be permitted, since he had already given the names of the witnesses he proposed to call, to give this evidence of alibi and called witnesses he had named, and, (ii) that the 2nd accused was not precluded, even though no notice was given for the 2nd accused under s. 402A and that there was no evidence legally admissible in support of a defence of a true alibi being put forward by the 2nd accused, from advancing to the jury for their consideration a case of mistaken identity or from denying that he was at the scene of the crime even if he was in the vicinity, but that the 2nd accused was precluded from leading affirmative evidence, by himself or by his witnesses, "to the effect that he was so far away from the *locus in quo* that it could be held established to a reasonable doubt that he could not have been present when the crime was actually committed and therefore could not have committed it". Indeed, a case of mistaken identity is not evidence in support of a defence of alibi, for the case of mistaken identity has always been considered, whenever identity is an issue, without a pre-existing notice of alibi (see *R v. Turnbull and Others* [1976], *PP v. Chiong Cheng Wah* [1988] 1 CLJ 534; [1988] 3 MLJ 56, *Dato Mokhtar bin Hashim & Anor v. PP* [1983] MLJ 232, *PP v. Hussain bin Sidin* [1991] 3 CLJ 2568, *Yau Heng Fang v. PP* [1985] 2 CLJ 22; [1985] 2 MLJ 335).

In effect, OKT2 testified he was not inside but outside the lounge – for about 10 minutes – at the material time of the commission of the crime inside the lounge. Mr Karpal submitted that that was not evidence in support of an alibi. Mr Karpal also submitted that a notice of alibi could not be given as the charge did not specify the exact location of the alleged offences whereas OKT2 was still within the locality and not elsewhere.

In *Vasan Singh v. PP (supra)*, the Supreme Court drew the following distinction between evidence of a bare denial and evidence in support of an alibi:

> An alibi defence will not be a simple statement of: 'I did not do it. I was not there. I was elsewhere'. That would be evidence of a bare denial. To establish his alibi, the accused must disclose where he was at the time of the alleged offence and what he was doing. He could be traveling at the time and the only evidence he has is a ticket or an endorsement on his passport or, as here, he was in bed. That would be evidence in support of his alibi.

"Where his defence is a bare denial, it is not evidence in support of an alibi and as such no notice is required under s. 402A ... To deny the accused from putting his defence ... however implausible it may appear, would most certainly occasion a miscarriage of justice" (*Ng Thian Soong v. PP* [1990] 2 MLJ 148, 152, per Mohamed Azmi SCJ).

But in the instant case, OKT2 affirmed he was outside the lounge at the time of the crime and that he was waiting outside the lounge, doing nothing in particular, at the material time of the crime. That was not a denial but evidence tending to show that by reason of OKT2's presence at a particular place or in a particular area (that is, outside the lounge) at a particular time (during the commission of the offences) that he was not or was unlikely to have been at the place where the offences were committed at the time of commission (inside the lounge). Unquestionably, that was evidence that by reason of his (OKT2) presence outside the lounge at the material time of the commission of the crime that OKT2 was not, or was unlikely to have been inside the lounge where the crimes were committed at the time of commission. Then, that evidence that OKT2 was outside the lounge at the time of the crimes and waiting there for 10 minutes – in substance affirmative proof that OKT2 was elsewhere and that OKT2's presence elsewhere is inconsistent with OKT2's presence at the time and place alleged and with participation in the crime at the alleged time and place of the act alleged – is evidence in support of an alibi. And that evidence that he was elsewhere, without a notice of alibi, must be excluded.

It follows, that the extant part of the defence to be considered is the case of mistaken identity – that OKT2 had walked out of the lounge before the crime, that David entered the lounge after he walked out from the lounge, and that OKT2 was not at the scene (meaning inside the lounge) of the crime.

OKT2 put David forward as the actual bespectacled man with the gunman, the real McCoy so to speak, at the material time. OKT2 testified that he entered the lounge at about 2am and spoke to an old man at the bar counter, that he walked out of the lounge before any robbery and shooting and that David walked into the lounge after he walked out of the lounge. Then OKT2 was not mistakenly identified as one of the two men who entered the lounge at about 2am. But OKT2 denied that he was at the scene of the crime (meaning inside the lounge) at the material time of the commission of the

crime. Unfortunately, OKT2 had not put his case at the earliest possible stage, through cross-examination of prosecution witnesses, that he had walked out and was outside the lounge and was not at the scene of the crime at the material time of the commission of the crime.

In *PP v. Lin Lian Chen* [1992] 4 CLJ 2086; [1992] 2 MLJ 561, 568, the Supreme Court per Edgar Joseph Jr SCJ observed:

> ... the defence is entitled, through cross-examination of prosecution witnesses, to put its case at the earliest possible stage. Indeed, it behoves the defence to do so, for we need hardly say that if a defence is sprung in court for the first time when the accused makes his defence from the witness box or the dock so that the prosecution is taken by surprise, the accused runs the risk of being criticized for having kept his defence 'up his sleeve', so to speak, and it being branded a recent invention.

As said, the issue at the stage of the prosecution case was the identity of the men who entered the lounge at about 2am and committed the crimes. Otherwise, the prosecution's entire version of the events at about 2am – that two men entered "Hot Lips" lounge, that one of those two men shot Edmund, that the other collected the property on the table, that there was a second shot, and that those two men fled from the scene after the second shot – was totally unchallenged, either by OKT1 or OKT2. (In *Wong Swee Chin v. PP* [1981] 1 MLJ 212, 213, the Federal Court per Raja Azlan Shah CJ (as HRH then was) held "a correct statement of the law is that failure of the defence to cross-examine the prosecution witnesses on the matter merely goes to the credibility of their testimony, to wit, the fact that they found the ammunition in the appellant's trouser pockets remain unshaken. On this point, we need only to say there is a general rule that failure to cross-examine a witness on a crucial part of the case will amount to an acceptance of the witness's testimony".) Indeed, none of the prosecution witnesses said anything about those two men or any one of them walking out of the lounge before the commission of the crimes. Rather, those witnesses testified that the two men who entered the lounge at about 2am only fled, only then together, from the scene, after the commission of the crimes. Granted, it was put to the prosecution witnesses that OKT2 between 2am to 2.30am on 5 August 1992, was not in that part of the lounge where the alleged crimes were said to have been committed. But it was not put to the prosecution witnesses that OKT2 walked out of the lounge before the commission of the crimes and or that another person walked into the lounge after OKT2 walked out of the lounge. OKT2 only stated his case that he had walked out of the lounge before the commission of the crimes and that David entered the lounge after he walked out from the lounge when he (OKT2) was making his defence from the witness box. Clearly, OKT2 had been keeping his defence "up his sleeve".

But is it equally evident that that defence is a recent invention? David is not a fictitious character. That much was established. Mr Jagdeep contended that David was a potential witness and should have been called by the prosecution or otherwise offered to the defence. But Mr Jagdeep forgot that David was only brought up for the very first time in OKT2's testimony and that OKT2 had not put his case that David entered the lounge after OKT2 walked out from the lounge. David was not a necessary witness to unfold the narrative of the prosecution. As the learned DPP stated, there was no gap in the prosecution story, as all (living) witnesses at (inside) the lounge had testified. David if at all was only a potential witness – and even then only apparent after OKT2's testimony – for the defence of alibi. Whereas the prosecution, without OKT2's notice of alibi, could not reasonably be expected to have anticipated that David, whom none of the witnesses at the scene said was at the scene and therefore not a potential witness to unfold the narrative of the prosecution, should be offered to the defence or would be required by OKT2.

David is not a fictitious character. Still it does not translate, just because David is not a fictitious character, that it was established thereby on a reasonable doubt basis that David entered the lounge after OKT2 left the lounge. It could not be as simple as that. On the facts and circumstances of the case, as a minimum reasonable basis for a reasonable doubt, there must be some evidence of David's presence or some evidence that would or could support David's presence at or about the vicinity of the scene of the crimes or about the time of the commission of the crimes. Reasonably, there would have been that evidence, if David had entered the lounge. And surely, one witness at least at the scene would have seen – if it was true that OKT2 walked out from the lounge and David (even if mistaken for OKT2) entered the lounge after OKT2 walked out from the lounge – one of the two men who entered the lounge at 2am walking out of the lounge. At least one witness at the scene would have seen David or a third pary entering the lounge. Also, OKT2 would not have not put his case, because it was so crucial to his case, that he had walked out of the lounge. But there is no evidence of David's presence and there is no evidence even remotely supporting David's presence at or about the vicinity of the scene of the crime at or about the time of the commission of the crimes. As against the weight of the unchallenged evidence on the entire sequence of events inside the lounge that not one of the two men who entered the lounge left the lounge until after the robbery and shooting, there is only the word of OKT2 who had been keeping his defence "up his sleeve" that he walked out of the lounge before the commission of the crimes and that David walked into the lounge after he walked out from the lounge. Surely, it is evident that David's alleged role was an invention and an afterthought.

What about the defence that OKT2 was mistakenly identified and that OKT2 was not at the scene at the time of the commission of the crimes? After all, there is evidence that David had the same body size as OKT2 and some of OKT2's facial attributes: (i) PW19 testified that David was about 28 years old (OKT2 in 1992 would have been 24), of moderate built (OKT2 is of moderate built), not bearded nor mustachioed (OKT2 claimed he was sporting a moustache) not wearing spectacles (OKT2 claimed he was not wearing spectacles on the night in question); (ii) OKT2 testified that David is of Chinese descent (OKT2 is probably of mixed parentage), wearing spectacles (OKT2 wears spectacles), about 5' 6" or 7" tall (OKT2 is about that height), moderate built (OKT2 is of moderate built), with body and facial appearance similar to his (OKT2), and with a moustache – something like his (OKT2). But it is still beyond argument that there could only be the possibility that David could have been mistaken for OKT2 if only David had been at "Hot Lips" at and or about the time of the commission of the crime. OKT2 said that he entered the lounge at about 2am and that he walked to the bar counter. However, other than OKT2's assertion, and that against the weight of the unchallenged evidence, there was no evidence that David was at or about the vicinity the scene of the crime at or about the time of the commission of the crime or that David (or any third party for that matter) entered the lounge after OKT1 and OKT2 entered the lounge at 2am. It is just not reasonable to accept the possibility that David (or any third party for that matter) was the bespectacled man with the gunman at the material time of the commission of the crime but mistaken by the witnesses at the scene for OKT2. The beyond all reasonable doubt evidence is that the same two men who entered the lounge at 2am committed the crimes in question. There was no such David at the scene. What OKT2 adduced has not cast any reasonable doubt on the positive identification by Ananth and Ooi that OKT2 was the bespectacled man in question who committed the s. 3A offence. What OKT2 adduced has not cast any reasonable doubt on the prosecution case which is wholly intact despite all said by OKT2. Beyond any question, there is no doubt whatsoever, (i) that OKT1 discharged a firearm, with intent to cause death or hurt to Edmund and Ramesh, at the time of the robbery that he and OKT2 were committing, (ii) that OKT2, who participated in the robbery and knew certainly after OKT1 discharged the 1st shot that OKT1 was having a firearm, took no steps whatsoever, let alone reasonable steps, to prevent the further discharge of that firearm, and, (iii) that OKT2 participated in the robbery after the discharge of the 1st shot. With respect, the submission that OKT2 had no prior knowledge of the firearm even if OKT2 was inside the lounge at the material time and therefore could not have prevented the discharge of the firearm, in the light of the established evidence, has no merits whatsoever. Perhaps, OKT2 might not have had prior knowledge of the firearm prior to the 1st shot. But

after the 1st shot, OKT2 could not have not known of the firearm and could not have not known that a firearm was just discharged. But OKT2 who must have heard the 1st shot and knew then that OKT1 was armed with a firearm did nothing to prevent the further discharge of that firearm. OKT2's only deed before the 2nd shot (and there was an interval of time between the shots, rather than that the shots were discharged in a single burst of fire as submitted by Mr Jagdeep) was his active participation in the scheduled offence. OKT2's defence has not raised a reasonable doubt as to his guilt. The court is totally convinced that OKT2 is guilty as charged.

For the reasons aforesaid, OKT1 and OKT2 are convicted of the offences for which they are respectively tried and sentenced to the penalty mandated by law.